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No. 89-386

Supreme Court, U.S.

FILED

OCT 4 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PORT AUTHORITY
TRANS-HUDSON CORPORATION,
Petitioner,

— against —
PATRICK FEENEY,
Respondent.

PORT AUTHORITY
TRANS-HUDSON CORPORATION,
Petitioner,

— against —
CHARLES T. FOSTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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On the Petition:
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16 pp

QUESTIONS PRESENTED

1. Is the Petitioner, Port Authority Trans- Hudson Corporation, immune from suit in the federal courts by virtue of the protections afforded by the Eleventh Amendment?
2. Has the immunity afforded by the Eleventh Amendment been waived by or on behalf of the Petitioner, Port Authority Trans- Hudson Corporation?
3. Is the Petition for a Writ of Certiorari untimely and therefore, should it be denied?

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Respondents, Patrick Feeney and Charles T. Foster, respectfully oppose the petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in the above-captioned consolidated cases.

STATEMENT

Respondents respectfully disagree with the characterizations contained in petitioner's brief, at page 4 thereof, of the opinion of the Second Circuit. The court examined the form and structure of PATH in great detail, citing numerous sections of the legislation creating and governing it. The court then considered the holding of Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), and further determined that PATH was not entitled to Eleventh Amendment immunity. The court did not

base its decision solely upon the determination that a verdict of liability would not place the state treasury at risk. The court also based its decision on a finding that the Port Authority has waived its immunity under the Eleventh Amendment. The court based its determination not only on the venue statute (N.Y. Unconsol. L. Section 7106 (McKinney 1979) and N.J. Stat. Ann. Section 32:1-162 (West 1963) but also upon a discussion of the legislation whereby PATH consented to being sued. Petitioner's statement of the case is thus both unfair and inaccurate.

REASONS FOR DENIAL OF THE WRIT

POINT I

There Is Insufficient Conflict Between The Second Circuit And The Third Circuit And The Petition Should Be Denied.

The granting of a writ of certiorari is entirely within the judicial discretion of this Court, and "will be granted only when there are special and important reasons therefore" S.Ct.R 17. While, at first blush, petitioner's brief paints a picture of dire and extreme conflict between the Second Circuit and Third Circuit, a careful review of the principle cases cited therein reveals that the conflict appears to be resolving itself, at least as far as the point of view of the Third Circuit is concerned. Great weight is placed upon the decision of the Third Circuit in Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey (PBA) 819 F.2d 413(3d Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 344 (1987). Since that case was decided, the Third Circuit appears to be moving away in some

degree from its holding that PATH is entitled to Eleventh Amendment immunity. Most recently, in Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655 (3d Cir. 1989), the court (in its decision that was handed down scant days prior to the Second Circuit's decision in Feeney and Foster) referred to its prior decision in Port Authority Police Benevolent Association, Inc. (supra) only in passing and, interestingly, in its consideration of New Jersey Transit's funding, placed great weight upon its determination that New Jersey Transit was not the alter ego of the state, by looking at whether the state must reimburse the agency. This is precisely one of the bases for the Second Circuit's decision denying Eleventh Amendment immunity to the petitioner.

Thereafter, in Leadbeater v. Port Authority Trans-Hudson Corporation, 873 F.2d 45 (3d Cir.1989), a case that was filed two days prior to the decision of the Second Circuit, the Third Circuit again moved away from its decision in Port Authority Police Benevolent Association, Inc. (supra). The court examined only two sections of the enabling legislation, N.Y. Unconsol. L. Section 7101 and Section 7106 (McKinney 1979) and reached its determination (not without some unease) that the venue provision of the aforementioned Section 7106 did not constitute a waiver of Eleventh Amendment immunity. The court did not consider the other sections of the legislation governing the establishment and conduct of PATH, as the Second Circuit did, and further the Third Circuit apparently based its determination upon the two district court

opinions in Feeney and Foster. Keeping in mind that both Fitchik (supra) and Leadbeater (supra) were both decided prior to the Second Circuit's decision in this case, it is apparent that the language and reasoning of the Third Circuit in both cases appears to be moving away from its determination in Port Authority Police Benevolent Association, Inc. (supra) and possibly towards the ultimate resolution of any disagreement or conflict so heavily emphasized in petitioner's brief.

Petitioner's reliance in its brief upon prior decisions of this Court, to support its argument that a substantial conflict exists between the Second Circuit and the Third Circuit, is misplaced. In Welch v. Texas Department of Highways and Public Transportation, 483 U.S.468 (1987),

this Court did not state that there can be no waiver of Eleventh Amendment immunity, even assuming that, for argument sake, PATH is considered an agency of the state. In Welch, this Court stated quite clearly that a state, and by inference an agency thereof, can waive its immunity and consent to suit in federal court. If that is the case, such a suit would not be barred by the Eleventh Amendment. The question thus becomes whether or not the waiver in the various statutes is stated in express terms so that the conclusion can only be that there has been a waiver of Eleventh Amendment immunity. It should be further noted that the question of express waiver by a state was not before this court in the Welch case.

Petitioner also refers to this Court's

holding in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) in support of its argument. However, this Court considered not only the impact of the judgment of liability on the state treasury, but also considered the fact that the Tahoe Regional Planning Agency was a political sub-division. The Second Circuit, in its decision below, likewise considered the structure and the powers and duties and statutes governing the Port Authority and cited this Court's holding in Lake Country Estates, Inc. (supra), including this Court's restriction of Eleventh Amendment protection to "one of the United States" (at 400) as a basis for its denial of Eleventh Amendment protection to the petitioner.

It is thus suggested that the apparent conflict, between the Second Circuit and

Third Circuit, so heavily relied upon in petitioner's brief, is more one of form than substance, and in two decisions handed down just prior to the decision of the Second Circuit herein, Fitchick and Leadbeater, the Third Circuit appears to be moving away from its earlier position taken in Port Authority Police Benevolent Association, Inc. (supra). It is submitted that the granting of the petition is unwarranted and unnecessary.

POINT II

The Petition For A Writ Of Certiorari Filed By The Petitioner Is Untimely And Should Be Denied.

The petition for the writ of certiorari filed by the Port Authority Trans-Hudson Corporation, the petitioner herein, was not filed within the time required by Title 28, U.S.C., Section 2101(c).

The judgment of the United States Court of Appeals for the Second Circuit in favor of the respondents was entered on April 26, 1989 (See petitioners brief pages A-22-23). Petitioners brief contains an admission, at page two thereof, of the entry of judgment on April 26, 1989. The petition for certiorari was filed on September 2, 1989, and accordingly is untimely and beyond the final date permitted by the aforesaid Title 28, U.S.C., Section 2101(c).

For the foregoing reason the petition for a writ of certiorari herein should be denied.

CONCLUSION

The Petition for a Writ of Certiorari

Should Be Denied.

Dated: Islip, New York
September 29, 1989

Respectfully submitted,

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